

Kevin R. Sutherland (State Bar No. 163746)
 Natasha N. Mikha (State Bar No. 270731)
 CLYDE & CO US LLP
 633 West 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600
 Facsimile: (213) 358-7699
 Email: kevin.sutherland@clydeco.us
 natasha.mikha@clydeco.us

Jeffrey J. Ellis (admitted *pro hac vice*)
 CLYDE & CO US LLP
 405 Lexington Avenue, 16th Floor
 New York, New York 10174
 Telephone: (212) 710-3900
 Facsimile: (212) 710-3950
 Email: jeff.ellis@clydeco.us

Attorneys for Defendant
 FRONTIER AIRLINES, INC.

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

14	ANDREA RIDGELL, on behalf of)	Case No.: 2:18-CV-04916 PA (AFMx)
15	herself and others similarly situated,) FRONTIER AIRLINES INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION
16	Plaintiff,	
17	v.	
18	FRONTIER AIRLINES, INC. a)	
19	Colorado corporation; AIRBUS S.A.S.,	Time: 1:30 p.m.
20	a foreign corporation doing business in)	Place: Courtroom of the Honorable Percy
21	the State of California; AIRBUS)	Anderson
22	GROUP HQ, INC., a corporation doing)	
23	business in the State of California,	
24	Defendants.	
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Frontier Airlines, Inc. (hereinafter "Frontier "), by and through its counsel of record, Clyde & Co US LLP, hereby opposes plaintiff's motion for class certification as follows:

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 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff's motion for class certification should be denied because plaintiff has failed to meet her burden of establishing that the certification requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied or that discovery would enable her to do so. Subject matter jurisdiction requires a plaintiff to not only establish viable claims on behalf of herself and the proposed classes but also to establish that class damages will meet the five million dollar threshold of the Class Action Fairness Act. Plaintiff, however, has presented no evidence concerning the alleged damages incurred by the proposed classes, has failed to establish that common issues of fact or law would predominate over individual inquiries and has failed to show that a class action would be superior to alternative procedures for resolution of any individual claims that might be asserted against Frontier. When it is further considered that the claims asserted by plaintiff are not only conclusory, factually suspect and preempted by federal law, it becomes readily apparent that plaintiff's motion should be denied and plaintiff's complaint dismissed.

STATEMENT OF FACTS

Plaintiff asserts this proposed class action on the basis of alleged "bleed air events."¹ First Amended Complaint, [Dkt No. 38], ¶¶ 16-88. Plaintiff alleges causes of action for strict liability, breach of warranties, negligence, negligent infliction of emotional distress and false imprisonment. However, plaintiff's claims are replete with conclusory and unsupported allegations. In that regard, plaintiff alleges in paragraphs 7 and 8 of her complaint that the Airbus defendants "design, manufacture and sell" aircraft, while alleging in paragraph 9 that Frontier operates aircraft. First

¹ Although plaintiff also references the alleged events in her complaint as "fume events," the term "bleed air event" is used in plaintiff's definition of the proposed nationwide class and, thus, Frontier references the alleged events accordingly. First Amended Complaint, [Dkt No. 38], p. 16, l. 14.

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1 Amended Complaint [Dkt No. 33], ¶¶ 7, 8 and 9. Nonetheless, the causes of action
 2 for strict liability on the basis of design defect, breach of warranties and negligence
 3 are alleged against "All Defendants" on the basis that all defendants bore some
 4 responsibility for, among other allegations, "designing, manufacturing, assembling,
 5 testing, maintaining, servicing, selling, marketing, promoting and providing warnings
 6 or instructions about the subject aircraft." First Amended Complaint [Dkt No. 33], ¶
 7 104 (emphasis added); see also ¶¶ 89-110.

8 Plaintiff cannot reasonably dispute that these causes of action do not apply to
 9 Frontier. Moreover, even if the negligence cause of action was construed to include
 10 an alleged duty to warn about a bleed air system which plaintiff concedes to be
 11 "common," and which is used on every Airbus aircraft and absent only from the
 12 Boeing 787, none of these claims or those for negligent infliction of emotional distress
 13 and false imprisonment are supported by any facts or legal basis for holding Frontier
 14 liable. First Amended Complaint [Dkt No. 33], ¶¶ 35, 70, 75, 103-125. Indeed it
 15 strains credulity to allege without any supporting facts that passengers waiting to
 16 board a flight "in the terminal area of the (Phoenix) airport" were "imprisoned" by
 17 Frontier. First Amended Complaint [Dkt No. 33], p. ¶¶ 104 and 123.

18 In relation to the foregoing, it is also relevant to note that at the case
 19 management conference held on October 1, 2018, counsel for plaintiff conceded that
 20 the proposed nationwide class of passengers would be seeking only economic
 21 damages for the cost of their airfare for flights onboard the allegedly defective Airbus
 22 aircraft. Declaration of Jeffrey J. Ellis ("Ellis Decl."), ¶ 4. Consistent with this
 23 assertion at the case management conference, plaintiff's complaint alleges that the
 24 proposed nationwide class has "paid a premium for the service, over similar
 25 alternatives . . . (and) all overpaid for the service." First Amended Complaint [Dkt
 26 No. 33], ¶ 85 (emphasis added). These claims, however, relate directly to air carrier
 27 prices, routes and services and in so doing, implicate the broad body of established
 28 case law interpreting the express preemption provision of the Airline Deregulation Act

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as well as the terms governing refunds contained in Frontier's contract of carriage. Declaration of Valerie W. Tyler ("Tyler Decl."), ¶ 4, Exhibit A.

Frontier's contract of carriage provides terms and conditions of transportation for passengers and their baggage on all flights operated by Frontier. Tyler Decl., ¶ 4, Exhibit A. The contract of carriage governs the rights and liabilities of Frontier's passengers and Frontier with respect to any claims arising out of transportation on domestic flights operated by Frontier. Tyler Decl., ¶ 4. Frontier's contract of carriage provides that a ticket entitles a passenger to transportation between the point of origin and the destination. Tyler Decl., ¶ 5, Exhibit A. Accordingly, the contract of carriage provides no basis for a refund in the event that a ticket has been fully used and the passenger has been transported from the point of origin to the destination. Tyler Decl., ¶ 7, Exhibit A.

Lastly, it is relevant to note that plaintiff makes no attempt to establish that even her individual claim meets the court's jurisdictional threshold as her attorney conceded at the case management conference that plaintiff's alleged "injuries" were transient in nature. Ellis Decl., ¶ 4.

ARGUMENT

I

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED BECAUSE THE CLAIMS ASSERTED BY PLAINTIFF AND THE PROPOSED CLASSES CANNOT BE MAINTAINED AGAINST FRONTIER

Plaintiff's motion begins by asserting that plaintiff should be afforded the opportunity to conduct discovery prior to seeking class certification. However, plaintiff's argument cites to *Kamm v. California City Development Co.*, a Ninth Circuit opinion which provides that the "propriety of a class action cannot be determined *in some cases* without discovery." 509 F.2d 205, 210 (9th Cir. 1975) (*emphasis added*). This action, however, is not one in which pre-certification

CLYDE & COUS LLP
 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

discovery is warranted. Discovery will not assist plaintiff in certifying a class action against Frontier because this Court lacks subject matter jurisdiction over the proposed class action pursuant to the Class Action Fairness Act ("CAFA"), and the claims against Frontier are both factually unsupported and clearly preempted by federal law.

A. The Claims Asserted By Plaintiff Are Insufficient To Establish Subject Matter Jurisdiction

Pursuant to CAFA, federal courts have subject matter jurisdiction over class actions filed pursuant to Rule 23 of the Federal Rules of Civil Procedure if two conditions are met: (1) the amount in controversy exceeds the sum or value of \$5 Million, exclusive of interest and costs; and (2) the matter is a class action in which any member of the class of plaintiffs is a citizen of a different state from any defendant, any member of the class of plaintiffs is a foreign citizen and any defendant is a citizen of a state, or any member of the class of plaintiffs is a citizen of a state and any defendant is a foreign citizen. *See* 28 U.S.C. § 1332(d).

While the amount in controversy alleged by a plaintiff asserting federal jurisdiction will generally be respected, if it appears to a "legal certainty" that the claim is actually for less than the jurisdictional amount, dismissal is warranted. *Naffe v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015). Pertinent instances which meet the "legal certainty" standard include instances where "a specific rule of law or measure of damages" would limit recoverable damages, or where "independent facts show that the amount of damages was claimed merely to obtain federal court jurisdiction." *Naffe*, 789 F.3d at 1040.

The admissions of plaintiff's counsel at the case management conference on October 1, 2018, as well as the case law governing these claims, establish that the amount in controversy requirement is not met here. When counsel for plaintiff was questioned by the Court regarding the types of damages purportedly suffered by the proposed class plaintiffs, she conceded that the proposed nationwide class of passengers would be seeking only economic damages for refunds of the cost of their

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 Los Angeles, California 90071
 Telephone: (213) 358-7600

1 airfare on flights that utilized the allegedly defective Airbus aircraft. Ellis Decl., ¶ 4.
 2 Not only does this representation to the Court establish that the proposed classes
 3 cannot meet the jurisdictional requirements of CAFA, it also relates directly to air
 4 carrier prices, routes and services and ignores the refund provisions of Frontier's
 5 contract of carriage. Tyler Decl., ¶ 4, Exhibit A.

6 The Airline Deregulation Act of 1978 (hereinafter "1978 ADA") expressly
 7 states that "no State . . . shall enact or enforce any law . . . relating to rates, routes, or
 8 services of any air carrier." See, P.L. 95-504, 49 U.S.C. § 41713(b)(1). As the
 9 Supreme Court stated in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992),
 10 Congress included this provision in the 1978 ADA in order to "ensure that the States
 11 would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S.
 12 at 378. The Supreme Court further stated that Congress' use of the term "relate to"
 13 was identical to the language used in other statutes and was intended to convey "a
 14 broad pre-emptive purpose" and an "expansive sweep." *Id.* at 383-84. The Court then
 15 stated that "State enforcement actions having a connection with, or reference to,
 16 airline rates, routes, or services are pre-empted." *Id.*

17 The Supreme Court next considered the scope of the 1978 ADA's preemption
 18 clause in *American Airlines v. Wolens*, 513 U.S. 219 (1995). That case involved an
 19 attempt to use State consumer protection laws to enforce what was alleged to be a
 20 breach of an air carrier's contractual obligations. The Court held that any "remedy"
 21 sought by a party to an airline contract must be "confined to a contract's terms" since
 22 that contract clearly relates to the airline's "rates and services." 513 U.S. at 229.

23 Plaintiff's complaint makes no reference to Frontier's contract of carriage
 24 despite the fact that it forms the basis for all of the transportation at issue and is
 25 integral to any preemption analysis. In this regard, it is relevant to note that like most
 26 airlines, Frontier's contract of carriage provides that "the ticket entitles the passenger
 27 to transportation between the point of origin and the destination." Tyler Decl., ¶ 5,
 28 Exhibit A. Accordingly, the contract of carriage provides no basis for a refund in the

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1 event that a ticket has been fully used and the passenger has been transported from the
 2 point of origin to the destination. Tyler Decl., ¶ 7, Exhibit A. The contract of carriage
 3 further precludes a class action from being brought pursuant to the contract of
 4 carriage. Tyler Decl., ¶ 8, Exhibit A.

5 Thus, plaintiff's economic damage/refund claim contradicts the terms of the
 6 Frontier contract of carriage and relates directly to Frontier's ticket prices, routes and
 7 services. In accordance with the specific language of the ADA, the contract of
 8 carriage and the aforesaid holdings of the Supreme Court, plaintiff's broad-based class
 9 action is clearly preempted.

10 ***B. Frontier Cannot Be Held Liable For Operating Airworthy Aircraft Or For***
 11 ***Not Warning About A Condition That The FAA Has Not Deemed Unsafe***

12 For nearly a century, Congress has recognized that federal control over aviation
 13 must be "intensive and exclusive." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S.
 14 292, 303 (1944) (J. Jackson, concurring). To that end, Congress enacted the Federal
 15 Aviation Act (the "Act") in 1958, the "whole tenor [of which was] to create and
 16 enforce one unified system of flight rules." *United States v. Christensen*, 419 F.2d
 17 1401, 1404 (9th Cir. 1969). Congress found the "creation of a single, uniform system
 18 of regulation vital to increasing air safety." *Abdullah v. American Airlines, Inc.*, 181
 19 F.3d 363, 368 (3d Cir. 1999). The Act, together with the broad authority given to the
 20 Federal Aviation Administration (hereinafter "FAA"), thus establishes a "uniform and
 21 exclusive system of federal [aviation] regulation." *City of Burbank v. Lockheed Air*
 22 *Terminal Inc.*, 411 U.S. 624, 639 (1973). Consistent with this understanding, the
 23 Ninth Circuit has held that the Act and its corresponding regulations "demonstrate an
 24 intent to occupy exclusively the entire field of aviation safety and carry out Congress'
 25 intent to preempt all state law in this field." *Montalvo v. Spirit Airlines*, 508 F.3d 464,
 26 471 (9th Cir. 2007).

27 The issue in *Montalvo* was whether air carriers had a duty to warn passengers of
 28 the risks of deep vein thrombosis ("DVT"). *Montalvo*, 508 F.3d at 468. After

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 Los Angeles, California 90071
 Telephone: (213) 358-7600

analyzing the Act and the federal regulations, the Court found that, through implied field preemption, the Act "preempts the entire field of aviation safety from state and territorial regulation." *Id.* at 468, 473-74. Applying this principle, the Court concluded that the air carriers were under no duty to warn about the potential risks of DVT "absent a federal mandate to do so." *Id.* Because no such mandate existed, the Court upheld the dismissal of plaintiffs' failure to warn claims. *Id.* at 474.

The Ninth Circuit reaffirmed in *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, that when the FAA "issues 'pervasive regulations' in an area...the [agency] preempts all state law claims in *that* area." 555 F.3d 806, 811 (9th Cir. 2009) (*emphasis in original*). The question in *Martin* was whether a federal rule governing airstairs preempted a tort claim by a passenger who was injured when she fell off such stairs. *Martin*, 555 F.3d at 808. The Court held that, because there was only one federal regulation on airstairs, the airstairs were not "pervasively regulated" and the Act did not preempt a state law claim that the airstairs were defective. *Martin*, 555 F.3d at 812.

In the case at bar, Frontier cannot be held liable for having operated aircraft that have been certified to be safe and airworthy by the FAA. As noted in *Martin*, in order for aircraft to be certified as airworthy, it must be shown that the aircraft "meets the agency's regulations, and 'that no feature or characteristic makes it unsafe. *Martin*, 555 F.3d at 8; *see also* Tyler Decl., ¶ 9. Plaintiff does not allege, and could not in good faith allege, that the Airbus aircraft operated by Frontier are not certified as airworthy by the FAA. In fact, the evidence provides the opposite. *See* Tyler Decl., ¶ 9.

Plaintiff also cannot dispute that cabin air systems are pervasively regulated by the FAA. Paragraph 94 of plaintiff's first amended complaint specifically alleges that:

[t]he Federal Aviation Administration (FAA) has issued a number of federal aviation regulations (FARs), airworthiness directives (ADs), and advisory circulars (ACs) regarding cabin air ventilation requirements and contaminant concentration limits.

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 Telephone: (213) 358-7600

1 First Amended Complaint [Dkt No. 33], ¶ 94. Moreover, paragraphs 95-98 of the
 2 complaint allege specific federal regulations governing cabin air systems. First
 3 Amended Complaint [Dkt No. 33], ¶¶ 95-98. What plaintiff does not and cannot in
 4 good faith allege is that the FAA has either deemed the Airbus cabin air system unsafe
 5 or has required a warning with respect to same. Plaintiff obviously recognizes the
 6 foregoing in that she only alleges in paragraphs 59-61 that the FAA is studying this
 7 issue. First Amended Complaint [Dkt No. 33], ¶¶ 59-61.

8 The Seventh Circuit's holding in *Bieneman v. City of Chicago*, 864 F.2d 463,
 9 471 (7th Cir. 1988) is instructive. There, the court specifically addressed federal
 10 preemption in the context of considering whether a lower court properly dismissed an
 11 action an action similar to the one at bar. Like here, plaintiff claimed aircraft that
 12 were deemed airworthy by the FAA to be defective because they were not equipped
 13 with equipment that plaintiff claimed to be required. In that regard, the Court framed
 14 the issue and its resolution as follows:

15 Bieneman's complaint suggests that damages should be awarded
 16 because there are too many flights per hour, or *because the aircraft*
 17 *are older models not fitted with high-bypass turbofan engines*, or
 18 because the planes do not climb at a sufficiently steep rate after
 19 takeoff. These subjects are governed by federal law, *and a state may*
 20 *not use common law procedures to question federal decisions*
 21 *or extract money from those who abide by them.*

22 864 F.2d at 473 (*emphasis added*).

23 Consistent with the foregoing, the court in *Air Evac EMS, Inc. v. Robinson*, 486
 24 F. Supp. 2d 713 (M.D. Tenn. 2007) held that the State of Tennessee was also
 25 preempted from regulating the type of equipment used in air ambulance helicopters.
 26 The district court cited to the preemption case law noted herein, enjoined the proposed
 27 regulation of the State of Tennessee and held that "only the FAA" has "responsibility
 28 for matters concerning aviation safety, *including the certification* and operation of

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1 aircraft." 486 F. Supp. 2d at 715 (*emphasis added*).

2 The FAA -- the Agency charged with the duty to promulgate the regulations
 3 and standards governing flight operations and safety -- has also rejected State attempts
 4 to require additional safety equipment on aircraft. In Interpretation 1975-29, Federal
 5 Aviation Decisions, I-48, the Chief Counsel of the FAA responded to a letter inquiring
 6 whether a State had the right to promulgate a rule requiring installation of an
 7 additional safety feature on aircraft using that State's airspace. *See* Department of
 8 Transportation (D.O.T.) Federal Aviation Administration, Interpretation 1975-29,
 9 1975 WL 342731 (May 6, 1975). The Chief Counsel to the FAA unequivocally
 10 rejected this proposal with language and reasoning which echoes the Supreme Court's
 11 holding in *Burbank*:

12 The expansive authority of the Administrator to prescribe safety
 13 standards applicable to civil aircraft in air commerce under Title VI of
 14 the [Federal Aviation Act of 1958] is indicative of *Congress' intent to*
 15 *preempt any state or local regulation* on the same subject matter. This
 16 preemptive intent is all the more forceful when the *nature* of air
 17 commerce is considered and the *necessity for uniformity* of regulation
 18 is reflected upon.

19 Pursuant to its broad statutory mandate, the FAA has issued a detailed
 20 and comprehensive scheme of rules and regulations requiring the
 21 installation of safety hardware under both its certification and
 22 operating rules. Your attention is particularly directed toward the
 23 certification and operating rules for air carriers found in Federal
 24 Aviation Regulation (FAR) Part 121 of Title 14. The breadth and
 25 scope of these regulations, *coupled with what we consider to*
 26 *be Congress' desire to make Federal superintendency of safety in air*
 27 *commerce an exclusive enterprise, requires a finding of Federal*
 28 *preemption with respect to any state or local regulation requiring*

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1 *installation of "Smoke Hoods" as described in your correspondence.*

2 Department of Transportation (D.O.T.) Federal Aviation Administration,
 3 Interpretation 1975-29, 1975 WL 342731, at *1 (May 6, 1975) (*emphasis added*).

4 Additionally, it is worth noting that, as plaintiff alleges in her complaint, Airbus
 5 is a "European multinational corporation that designs, manufactures, and sells civil
 6 and military aeronautical products worldwide." First Amended Complaint [Dkt No.
 7 33], ¶ 7. As such its products are subject to initial regulation by the European
 8 Aviation Safety Agency (EASA). Similar to the FAA, EASA describes its mission as
 9 ensuring "the highest common level of safety protection for [European Union]
 10 citizens" and "the highest common level of environmental protection." It further
 11 states that one of the ways that it achieves this mission is to "certify & approve
 12 products and organisations, in fields where EASA has exclusive competence (e.g.
 13 airworthiness)." ²

14 In conjunction with its regulatory role, EASA has specifically studied the
 15 "bleed air issue" ³ which plaintiff cites as the crux of all of her claims. In that regard,
 16 EASA has made the following findings in a 2014 report. First, EASA has noted that
 17 "airborne contaminations [similar to those found in aircraft] are also observed in
 18 typically indoor environments like offices, schools, kinder gardens or dwellings." ⁴
 19 EASA also found that "[t]aking indoor air guidelines into consideration the cabin air is
 20 no object of any concerns." ⁵ EASA then explicitly noted that:

21 [t]o state the obvious, there is no contaminant-free indoor
 22 _____

23 ² See <https://www.easa.europa.eu/the-agency/the-agency>.

24 ³ See EASA – Final Report on Preliminary Cabin Air Quality Measurement
 25 Campaign, available at
 26 https://www.easa.europa.eu/sites/default/files/dfu/EASA%20CAQ%20Study%20Final%20Report_21.03.2017.pdf.

27 ⁴ *Id.* at p.105.

28 ⁵ *Id.* at p. 105-06.

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environment. The aircraft cabin is no exception. However, due to the exceptional high air exchange rates in aircraft, the cabin air has been proven to be less polluted compared to normal indoor environments (e.g., offices, dwellings, etc.). Volatile contaminations in the cabin are thus depleted quickly.⁶

In summarizing the "current data situation," EASA noted that "[t]he still ongoing discussion about the so-called 'aerotoxic syndrome' remains completely incomprehensible."⁷

The foregoing statements are obviously contrary to what plaintiff alleges in her complaint. This is not surprising, since plaintiff's complaint asserts that the FAA has been aware of allegations about "bleed air" for 24 years but has never deemed the bleed air system to render an aircraft not airworthy nor required any airline to warn about the bleed air system. In light of EASA's findings, the foregoing case law and the specific holding by the Ninth Circuit in *Montalvo* that air carriers are under no duty to warn about the alleged potential health risks "absent a federal mandate to do so," plaintiff's claims in the case at bar against Frontier should be dismissed just as the claims against the air carrier defendants were dismissed in *Montalvo*. 508 F.3d at 473, 474. Moreover, since the plaintiff's false imprisonment claim is based only on conclusory allegations and is patently devoid of any credibility, that claim should be dismissed as well. Although the latter may not be preempted by federal law, plaintiff fails to establish that this claim, or any of the others she asserts against Frontier, satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, as provided in further detail below.

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⁶ *Id.* at p. 106.

⁷ *Id.* at p. 109.

CLYDE & COUS LLP
 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

II

**PLAINTIFF'S MOTION FOR CLASS CERTIFICATION SHOULD BE
 DENIED BECAUSE THIS ACTION DOES NOT SATISFY THE
 REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL
 PROCEDURE**

Plaintiffs seeking to certify a class must satisfy all requirements of Rule 23(a) of the Federal Rules of Civil Procedure, in addition to satisfying the requirements of one of the three subparts of Rule 23(b). Plaintiff asserts that this action qualifies pursuant to Rule 23(a) and (b)(3). However, it is plaintiff's burden to prove by a preponderance of the evidence that all requirements of Rule 23 are satisfied. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (noting that, "as the party seeking class certification, [plaintiff] bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)."). As explained in further detail below, plaintiff has failed to meet her burden of establishing that the proposed classes satisfy any of the requirements of Rule 23.

A. Plaintiff Fails to Satisfy the Numerosity Requirement

While a plaintiff need not establish the precise number of members in a purported class, there must be some showing, absent a mere allegation, that the class satisfies the numerosity requirement. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009). In *Vega*, the Eleventh Circuit noted that the plaintiff submitted no evidence concerning the number of defendant's retail stores or sales representatives in Florida, relying instead upon the fact that the defendant employed "thousands" of associates nationwide. *Vega*, 564 F.3d at 1267. However, the class that plaintiff sought to certify was for sales representatives employed during the class period in Florida. *Vega*, 564 F.3d at 1267. The Court found that the "district court's inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in sheer speculation." *Vega*, 564 F.3d at 1267. The Court

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 Los Angeles, California 90071
 Telephone: (213) 358-7600

1 noted that the record was "utterly devoid" of any showing that the proposed class of
 2 sales representatives in Florida was "so numerous that joinder of all members is
 3 impracticable." *Vega*, 564 F.3d at 1267–68.

4 Similarly, the Third Circuit has declined to find that the numerosity requirement
 5 was met where there was a "complete lack of evidence specific to BMWs purchased
 6 or leased in New Jersey with Bridgestone [run-flat tires] that have gone flat and been
 7 replaced." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012)
 8 (distinguished by Ninth Circuit in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,
 9 1130 (9th Cir. 2017) on other grounds). In that case, plaintiff sought to certify a class
 10 of purchasers and lessees of BMW cars who had a specific type of tire replaced.
 11 *Marcus*, 687 F.3d at 597. The Third Circuit found that the district court had "crossed
 12 the line separating inference and speculation" because, although BMW "is a large
 13 company that sells and leases many cars throughout the country," the court had
 14 certified a "New Jersey class of owners and lessees with Bridgestone [tires] that have
 15 gone flat and been replaced." *Marcus*, 687 F.3d at 597. The Third Circuit noted that,
 16 while it may be "tempting to assume that the New Jersey class meets the numerosity
 17 requirement based on the defendant companies' nationwide presence," the district
 18 court had abused its discretion in certifying the class without any evidence supporting
 19 numerosity. *Marcus*, 687 F.3d at 597.

20 In support of her assertion that the numerosity requirement for her proposed
 21 nationwide class is met, plaintiff merely alleges that "Frontier operates hundreds of
 22 flights each day and thus it is clear that the number of class members can easily extend
 23 into the thousands." Motion for Class Certification, [Dkt No. 38], p. 7, ll. 3-4.
 24 Similar to the plaintiffs above who relied upon the defendant's nationwide presence
 25 without submitting any evidence of the specific class they sought to certify, it appears
 26 that plaintiff intends to rely merely upon the number of flights conducted by Frontier
 27 per day, rather than offering any evidence concerning the number of flights which
 28 may have experienced alleged bleed air events. While plaintiff may assert in her reply

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 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

that she requires discovery in order to provide such evidence, this argument would be unavailing. Plaintiff does not need information or documents from Frontier in order to make the showing required at the certification stage, as plaintiff could have presented evidence in her motion for class certification concerning the estimated frequency of alleged bleed air events in a given period of time. Any assertion that plaintiff lacks access to studies, reports, or experts on the topic would be belied by the technical allegations of her complaint. First Amended Complaint, [Dkt No. 33], ¶¶ 34-52 and 75-81.

In light of the foregoing, plaintiff has not satisfied the numerosity requirement with respect to her proposed nationwide class of all passengers who have traveled with Frontier and "experienced a bleed air event." With respect to the proposed subclass of plaintiff's fellow passengers on flight no. 1630, the numerosity requirement is likely met. However, both proposed classes fail to meet the other Rule 23 requirements, as provided in further detail below.

B. Plaintiff Fails to Satisfy the Commonality Requirement

Commonality requires that plaintiffs "demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (*internal citation omitted*). In order to satisfy the commonality requirement, it must be established that the claims of the proposed class depend on at least one common issue of law or fact whose resolution "will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke." *Dukes*, 546 U.S. at 350. Courts are required to conduct a "rigorous analysis" to ensure that the requirements of Rule 23(a) are met. *Dukes*, 564 U.S. at 350–51. The requisite "rigorous analysis" may require courts "to probe behind the pleadings" and will "[f]requently entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 350–51.

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 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

In *Dukes*, the Supreme Court found that commonality was not met because one plaintiff's experience of workplace discrimination was "insufficient to infer that 'discriminatory treatment is typical of the employer's employment practices.'" *Dukes*, 564 U.S. at 356 (*internal citation omitted*). The Court noted that the members of the proposed class held different jobs for variable lengths of time in different stores across the country and appeared to have little in common apart from their sex and the class action lawsuit. *Dukes*, 564 U.S. at 360. In the instant case, the proposed class members similarly have very little in common apart from the fact that they have flown on aircraft operated by Frontier.

In another action where commonality was not established, the Fifth Circuit found that the district court had abused its discretion in certifying a class of children in the Texas state foster care system. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 843 (5th Cir. 2012). The Fifth Circuit noted that the district court had not conducted the rigorous analysis required, as it had accepted plaintiffs' contention that "systemic deficiencies" in the foster care system created common questions of fact, but failed to consider the defendant's arguments that "dissimilarities within the proposed class precluded commonality with specific reference to the elements or defenses for establishing the class claims." *Perry*, 675 F.3d at 843. Specifically, the Court noted that defendant had raised the argument that "the individual class member's substantive due process claims are not capable of classwide resolution because deciding each plaintiff's claim requires an individualized inquiry regarding whether the State's conduct 'shocks the conscience.'" *Perry*, 675 F.3d at 843. Accordingly, the Fifth Circuit remanded for the district court to look beyond the pleadings and sufficiently analyze whether the class claims contained individualized issues that would prevent certification. *Perry*, 675 F.3d at 843.

Similar to the analysis in *Dukes*, one passenger's experience with a single alleged bleed air event is insufficient to infer that the alleged event was typical of all other alleged events. In this case, the Court need not even go beyond the pleadings to

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determine that commonality is not satisfied, as the dissimilarities in the proposed classes are apparent from the complaint. Plaintiff alleges that, during her flight with Frontier, the aircraft "experienced a problem with the air quality" and that she and other passengers experienced symptoms including coughing and eye irritation. First Amended Complaint, [Dkt No. 33], p. 5, ll. 10-14. Plaintiff's complaint alleges that a handful of Frontier flights other than plaintiff's have been diverted due to "smoke," "a suspicious odor," "an odor" and "smoke." First Amended Complaint, [Dkt No. 33], p. 11, ll. 7, 9, 11 and 14. The descriptions provided for these alleged events indicate that the events are not similar to the event alleged by plaintiff, which references neither smoke nor an odor, nor are they similar to one another, as an event involving smoke is not necessarily the same as an event involving odor.

However, a probe beyond the pleadings further establishes that plaintiff cannot satisfy the commonality requirement with respect to either proposed class. This is clear in plaintiff's assertion of the perceived common issues, which she describes as including: "(1) whether the design is defective, (2) what information Frontier knew or had access to regarding the likelihood of fume events, and (3) whether members of the class were subject to forced and nonconsensual confinement." Motion for Class Certification, [Dkt No.38], p. 7, ll. 21-23. These alleged common issues do not satisfy the commonality requirement as to Frontier. Plaintiff concedes in her complaint that Frontier did not design the aircraft, so whether the aircraft design is defective is not a common question which is vital to plaintiff's resolution of her claims against Frontier. With respect to what information Frontier knew or had access to, this is also not a question which is vital to resolution of plaintiff's claims against Frontier, because the operations of an air carrier are exclusively governed by federal law, as explained in further detail above. No amount of knowledge changes the fact that Frontier is under no duty to warn absent a federal mandate to do so. Further, plaintiff's final alleged common question is not a question that is common to all proposed class members.

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In order to prove false imprisonment, plaintiff would have to establish that the alleged confinement was intentional. *Scofield v. Critical Air Medicine*, 45 Cal. App. 4th 990, 1001 (1996). As plaintiff appears to be alleging that the broader nationwide class of passengers may also have experienced confinement, plaintiff would have to establish Frontier's intent with respect to every alleged instance of false imprisonment. Individualized inquiries would also be necessary on plaintiff's two other causes of action against Frontier. With respect to negligence,⁸ plaintiff must establish that each class member was harmed and that the harm was substantially caused by the alleged event. *Bockrath v. Aldrich Chemical Co.*, 21 Cal. 4th 71, 79 (1999). A negligible or theoretical cause is insufficient to establish liability. *Bockrath*, 21 Cal. 4th at 79. Similarly, to prove negligent infliction of emotional distress, plaintiff must establish that each class member suffered "serious emotional distress" which was substantially caused by the alleged event. *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 928 (1980). Both of these showings fail to satisfy the commonality requirement, as they would require individualized inquiries. Whether an alleged event could be deemed a "substantial cause" of any alleged harm will depend upon the type, duration and pervasiveness of the alleged event, as well as the type of harm alleged to have been sustained by each of the class members.

In light of the necessity of conducting individualized inquiries in order to arrive at a verdict or judgment on all of plaintiff's three causes of action against Frontier, plaintiff's claims do not contain common issues of fact or law for purposes of the

⁸ While Frontier disputes that the negligence cause of action is properly alleged against Frontier, as it includes reference to the design and manufacture of aircraft for which Frontier is not responsible, Frontier presumes for purposes of this motion that some of plaintiff's allegations in this cause of action could be alleged against Frontier. Accordingly, for purposes of this class certification discussion, Frontier addresses only the three causes of action from plaintiff's first amended complaint which can conceivably be asserted against Frontier on the basis of the allegations therein: negligence, negligent infliction of emotional distress and false imprisonment.

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1 commonality requirement.

2 ***C. Plaintiff Fails to Satisfy the Typicality Requirement***

3 While this is a separate requirement under Rule 23, it tends in practice "to
 4 merge" with commonality. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147,
 5 157, fn. 13 (1982). The purpose of this requirement is to ensure that the class
 6 representative possesses the same interest and suffered the same injury as the
 7 proposed class members such that her claims and defenses are typical of those of the
 8 proposed class. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).
 9 Together, both requirements serve as "guideposts for determining whether under the
 10 particular circumstances maintenance of a class action is economical and whether the
 11 named plaintiff's claim and the class claims are so interrelated that the interests of the
 12 class members will be fairly and adequately protected in their absence." *General Tel.*
 13 *Co. of Southwest v. Falcon*, 457 U.S. 147, 157, fn. 13 (1982).

14 For the reasons provided above in the discussion on commonality, it is not clear
 15 that plaintiff suffered the same injury as the proposed class members. Further,
 16 statements made at the case management conference on October 1, 2018 appear to
 17 indicate that plaintiff does not necessarily possess the same interest as the proposed
 18 class members. Ellis Decl., ¶ 4. Plaintiff's counsel appeared to concede that the
 19 proposed nationwide class of passengers would be seeking only economic damages
 20 for the cost of their airfare on flights that allegedly experienced fume events and that
 21 the recovery of the proposed sub-class of passengers on plaintiff's flight would be
 22 focused on the false imprisonment claim as opposed to any physical injuries. Ellis
 23 Decl., ¶ 4. As counsel effectively conceded that plaintiff and the members of the
 24 proposed sub-class of passengers on plaintiff's flight would be focused on the false
 25 imprisonment claim, plaintiff's claim is not typical of the broader nationwide class.

26 ***D. Plaintiff Fails to Satisfy the Adequacy Requirement***

27 The final prerequisite of Rule 23(a) is adequacy, which requires that the
 28 proposed class representative "fairly and adequately protect the interests" of all

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 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
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members of the proposed classes. Fed. R. Civ. Proc. 23(a)(4). The Supreme Court has noted that, in practice, the commonality and typicality requirements also tend to "merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157, fn. 13 (1982).

Based on the representations in the declarations submitted in support of the motion for class certification, Frontier does not presently have any concerns regarding competency of counsel or conflicts of interest. However, plaintiff fails to satisfy the adequacy requirements for all of the reasons cited in the discussions above concerning commonality and typicality, including that she appears to have limited the recovery of proposed class members to only the costs of their airfare before the class has been certified, which may not be representative of the types of damages that other proposed class members would have sought if plaintiff were not their proposed representative.

E. Plaintiff Fails to Satisfy the Rule 23(b) Requirements

As explained above, Rule 23(a) has not been satisfied. But if the Court were to determine that it has been satisfied, the Court would next consider whether one of the requirements of Rule 23(b) have been satisfied. Plaintiff alleges that this action meets the requirements of Rule 23(b)(3) in that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. Proc. 23(b)(3).

1. Plaintiff Fails to Satisfy the Predominance Requirement

As explained above, plaintiff cannot establish a single common question for purposes of Rule 23(a)(2), but even if plaintiff had established a common question, her request for class certification fails to satisfy the requirement that questions of law or fact common to class members "predominate over any questions affecting only individual members." Fed. R. Civ. Proc. 23(b)(3). The Supreme Court has noted that,

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 Telephone: (213) 358-7600

"[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

However, despite this requirement being more demanding than those of 23(a), plaintiff spends the least time on it, likely in acknowledgment of the weakness of her potential arguments. With respect to this requirement, plaintiff merely alleges that "each of the claims can be demonstrated or refuted with common evidence" and all the claims "arise from common facts." Motion for Class Certification, [Dkt No. 38], p. 9, ll.20-23. This is clearly insufficient to meet plaintiff's burden of establishing that the alleged common issues of fact or law predominate over questions affecting individual members. As explained in more detail above, none of plaintiff's alleged common questions are vital to resolution of her claims against Frontier and each of her causes of action against Frontier would require numerous individualized inquiries. Accordingly, plaintiff has not satisfied the requirement of predominance.

2. Plaintiff Fails to Satisfy the Superiority Requirement

In order to determine whether a class action is "superior" to other methods of adjudicating the controversy, Rule 23(b)(3) lists four factors for consideration: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. Proc. 23(b)(3).

In her motion, plaintiff asserts that adjudicating the claims as class claims "will be significantly less burdensome than if the matter were prosecuted individually" and that "there are no manageability issues." Motion for Class Certification, [Dkt No. 38], p. 10, ll. 9-10 and 16. These two assertions are insufficient to establish that superiority is satisfied in this case. As provided in further detail above, resolution of the claims in this action would require numerous individualized inquiries and, thus,

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 633 W. 5th Street, 26th Floor
 Los Angeles, California 90071
 Telephone: (213) 358-7600

the proposed class action would actually be more burdensome than actions brought by individual passengers. Additionally, where numerous individualized issues will arise, the burden is on plaintiff to present a manageable trial plan adequate to deal with such issues. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). Plaintiff has not presented any trial plan but merely asserts, without support, that there are no manageability issues. Accordingly, plaintiff has not met her burden of establishing that the superiority requirement is met.

As plaintiff cannot establish that any of the requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied, she has failed to meet her burden and the motion for class certification should be denied.

CONCLUSION

In light of the foregoing, Frontier Airlines, Inc. respectfully requests that the Court deny plaintiff's motion for class certification and, should the Court deem it appropriate to do so, dismiss plaintiff's entire action against Frontier since there is no basis in law or fact to render Frontier liable for the claims asserted herein.

Dated: October 29, 2018

CLYDE & CO US LLP

By: /s/ Natasha N. Mikha

KEVIN R. SUTHERLAND

NATASHA N. MIKHA

Attorneys for Defendant

FRONTIER AIRLINES, INC.

PROOF OF SERVICE**STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years, and not a party to the within action. My business address is 633 West 5th Street, 26th Floor, Los Angeles, California 90071.

On October 29, 2018, I served the document(s) described as:

FRONTIER AIRLINES, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

on the parties in this action addressed as follows:


SEE ATTACHED SERVICE LIST

in the following manner:

- ☐ **(BY FAX):** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- ☐ **(BY MAIL):** as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- ☐ **(BY OVERNIGHT DELIVERY):** I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.
- ☐ **(BY PERSONAL SERVICE):** I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).
- ☒ **(BY CM/ECF):** by electronic filing system with the clerk of the Court which will send a Notice of Electronic Filing to all parties with an e-mail address of record. who have filed a Notice of Consent to Electronic Service in this action:

I declare I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **October 29, 2018**, at Los Angeles, California.


Kathy Rollins

CLYDE & CO US LLP
633 West 5th Street, 26th Floor
Los Angeles, California 90071
Telephone: (213) 358-7600

CLYDE & CO US LLP
633 West 5th Street, 26th Floor
Los Angeles, California 90071
Telephone: (213) 358-7600

SERVICE LIST

Marcus J. Bradley, Esq. (SBN 174156)
Kiley L. Grombacher, Esq. (SBN 245960)
BRADLEY/GROMBACHER LLP
2815 Townsgate Road, Suite 130
Westlake Village, California 91361
Tel: (805) 270-7100
Fax: (805) 270-7100
E-Mail: mbradley@bradleygrombacher.com
kgrombacher@bradleygrombacher.com

Attorneys for Plaintiff

Kristi D. Rothschild, Esq. (SBN 222727)
Julian Alwill, Esq. (SBN 259416)
ROTHSCHILD & ASSOCIATES, APC
27 W. Anapamu Street, Suite 289
Santa Barbara, California 93101
Tel: (805) 845-1190
Fax: (805) 456-0132
E-Mail: krothschild@kdrllawgroup.com
jalwill@kdrllawgroup.com

Attorneys for Plaintiff